Employment Standards TRIBUNAL

An appeal

- by -

Mountview Dodge Chrysler Ltd.
("Mountview")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2007A/27

DATE OF DECISION: June 5, 2007

DECISION

OVERVIEW

1. This is an appeal by Mountview Dodge Chrysler Ltd. ("Mountview") challenging a determination (the "Determination") of a delegate of the Director of Employment Standards (the "Delegate") dated August 14, 2006. The Delegate determined that Mountview had contravened sections 58 and 63 of the *Employment Standards Act* (the "*Act*") and section 46 of the *Employment Standards Regulation* (the "*Regulation*"), in respect of five complaints filed by Bill MacKenzie, Raymond Telford, Roderick Fennell, Roland Robertson, and Gener Pacturayan, respectively, all of whom were former employees of Mountview.

2. The Delegate ordered that Mountview pay sums in respect of compensation for length of service, annual vacation pay, and interest totalling $12,613.94. The Delegate also imposed two administrative penalties of $500.00 in respect of the contraventions, pursuant to section 29 of the *Regulation*. The total owed by Mountview came to $13,613.94.

3. As it appeared on its face that Mountview's appeal had been filed out of time, the Tribunal determined that I should first decide, as a preliminary matter, whether the appeal should be permitted to proceed on its merits, or whether it should be dismissed pursuant to section 114(1)(b) of the *Act*.

4. I have before me the Appeal Form and submission delivered to the Tribunal by Mountview on March 22, 2007, the Delegate's Determination and Reasons for the Determination, submissions from the Delegate together with documents I infer the Delegate has delivered in compliance with her obligation under section 112(5) of the *Act* to provide the record that was before her at the time the Determination was made, submissions from Roderick Fennell, Raymond Telford, Gener Pacturayan and Roland Robertson, and a further submission from Mountview.

5. The Tribunal has determined that I will decide the preliminary issue on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

FACTS

6. For many years, Mountview operated an auto dealership in North Vancouver, British Columbia. On or about October 31, 2005 the business was sold. The five complainants received a letter of the same date advising that November 30, 2005 would be their last day of work. The new owner of the business declined to offer them employment thereafter.

7. All of the complainants alleged that they had worked for Mountview for periods of time, respectively, that entitled them to notice, or compensation for length of service, in excess of the four weeks provided. Mountview and its directors/officers did not cooperate with the Delegate during her investigation. In particular, they failed to respond to requests for submissions and a Demand for Records.

8. In the absence of information from Mountview, and on reviewing the material provided by the complainants, the Delegate decided that the complaints were made out, and issued her Determination.

The record discloses that copies of the Determination were received by Mountview and its directors/officers in a timely way, in or about mid-August 2006. In her submissions the Delegate advises that determinations in respect of the Mountview directors/officers were later issued in November 2006. However, it was not until the Delegate referred the matter to collection, and a bailiff contacted one of the principals of Mountview, that the appeal was filed on March 22, 2007.

ISSUE

9. Should the Tribunal extend the time period within which Mountview may request an appeal to March 22, 2007, the date Mountview filed its Appeal Form?

ANALYSIS

10. Section 112(3) of the *Act* provides that a person served with a determination has either 30 days or 21 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 30 days after the date of service. The time period is only 21 days if the determination is personally served or served by means of a transmission of the determination to the person electronically or by fax machine.

11. In this case, the uncontradicted evidence supplied by the Delegate supports her assertion that Mountview and its directors/officers received the Determination within days of its being issued in August 2006.

12. The time limits within which one must appeal a determination are to be construed having regard to the purposes of the *Act*, set out in section 2. One of those purposes is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly.

13. Pursuant to section 109(1)(b) of the *Act*, the Tribunal may extend the time period for requesting an appeal even though the period has expired. In considering whether to extend the time, the Tribunal is exercising a discretion, and it will not grant an extension as a matter of course. Rather, the appellant has the burden of demonstrating that there are compelling reasons why the appeal should be permitted to proceed on the merits, notwithstanding that it has been filed late (see *Niemisto* BC EST #D099/96; *Tang* BC EST #D211/96).

14. The following is a non-exhaustive list of factors the decisions of the Tribunal suggest should be considered when it determines whether an appeal filed late should be permitted to proceed on its merits:

- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
- There has been a genuine and ongoing bona fide intention to appeal the determination;
- The respondent parties and the Director have been made aware of the appellant's intention to appeal the determination;
- The respondent parties will not be unduly prejudiced by the granting of the extension, and;
- There is a strong prima facie case in favour of the appellant.

15. Upon consideration of these factors, I have concluded that there should be no extension of time in this case, and that Mountview's appeal should, therefore, be dismissed.

16. Mountview's explanation for its delay in prosecuting its appeal appears in a memorandum attached to its Appeal Form, over the signature of its former president, a Seyed Hassan Banisadr. It says this:

> My ignorance of the procedure is the reason of this late appeal. I thought that once the Ministry of Labor has made a Determination, we would go to a civil court of law; in which I can explain my position.

17. Previous decisions of the Tribunal have made it clear that a lack of familiarity with the procedures under the *Act* does not constitute a reasonable and credible explanation for a failure to request an appeal within the statutory time period (see *Kerr* BC EST #D208/04). Mr. Banisadr's "ignorance of the procedure" does not, therefore, support a decision to extend the time.

18. Nor can I conclude that Mountview has demonstrated a genuine and ongoing bona fide intention to appeal the Determination. The uncontradicted evidence of the Delegate is that Mountview and its principals ignored the process throughout. Indeed, no communication on behalf of Mountview appears to have been received by anyone until collection proceedings had commenced, and a bailiff had made contact with Mr. Banisadr, several months after the Determination was issued. When, as here, a party decides to file an appeal only after learning that the Director has taken steps to try to collect the amount owed under a determination, the Tribunal is entitled to infer that the party had no genuine and ongoing bona fide intention to appeal the determination (see *Mega Tire* BC EST #D407/97).

19. While none of the complainants in this case have offered evidence of unusual prejudice should I extend the time for the filing of Mountview's appeal, it is trite to say that any delay must be considered prejudicial to the extent that it deprives a successful party of the monies to which he has been found to be entitled. The Tribunal may be prepared to overlook a short delay, if the other factors it must consider on an application to extend argue cogently that the appeal should be heard on the merits. In this case, however, Mountview's delay of approximately six months before filing its appeal is startling. Such a long delay must weigh heavily against a decision to extend (see, for example: *Obeid* BC EST #D556/02).

20. Finally, I do not consider that Mountview has shown a strong prima facie case that the Determination is incorrect. In its material, Mountview asserts the following as reasons why it might succeed if the appeal were permitted to proceed:

- Mountview closed in November 2005, having suffered significant financial losses;
- The complainants received notice, they were paid for the work they did, and "they are still working";
- The complainant Mackenzie was a part-time worker and was entitled to no notice, for that reason;
- The complainant Fennell was only employed for seven years, not the eighteen years identified in the Determination;
- The requirement for the provision of notice or termination pay in section 64 of the *Act* is subject to an exception in section 65 where there is the "closure of an operation";
- Section 97 of the *Act* provides that where a business is disposed of, the employment of an employee of the business is deemed to be continuous and uninterrupted by the disposition.

21. I will deal with these submissions in order.

22. The fact that Mountview ceased to do business in November 2005, having suffered financially, is, quite simply, irrelevant. It does not absolve Mountview from liability in respect of the items identified by the Delegate in the Determination. This is so because the provisions of the *Act* are minimum statutory requirements, which an employer must meet regardless of its financial circumstances.

23. The issue in this case is not whether the complainants received notice. The Delegate agreed with Mountview that notice was given, and no issue was raised that Mountview failed to pay the complainants for the work they performed while employed. The issue was whether the notice given was sufficient having regard to the requirements of the *Act*. The Delegate determined that it was not. The fact that the complainants may have continued to work elsewhere after their dismissal is also of no moment when consideration is given to Mountview's obligation under section 63 of the *Act*. This is so because notice or compensation for length of service under section 63 is a statutory entitlement. It is not reduced by the fact that an employee finds other work after discharge, which in the circumstances of a claim for damages for wrongful dismissal might result in a successful plea of mitigation (see *B. & C. List* BC EST #RD641/01; *Malet Transport Corp.* BC EST #D258/03).

24. The fact that the complainant MacKenzie may have been a part-time employee cannot ground a successful appeal. In order for Mr. MacKenzie to be entitled to the protections of the *Act*, it need only be determined that he was an employee. Mountview does not dispute that it employed Mr. MacKenzie. The fact that Mr. MacKenzie may have worked part-time does not act as a bar to his receiving the minimum benefits provided by the legislation (see *Maharaj* BC EST #D388/02).

25. Mountview challenges the Delegate's finding that the complainant Fennell was employed by it for a period longer than eight years. It claims that the period was only seven years. The Delegate's finding in this regard is a finding of fact. The Tribunal has very limited jurisdiction to question a delegate's findings of fact. Generally, the Tribunal is precluded from doing so unless an appellant is able to establish palpable and overriding error. I am not persuaded that Mountview has shown a prima facie case that such an error has occurred. There was clearly some evidence from Mr. Fennell, albeit sketchy, on the basis of which the Delegate could conclude that Mr. Fennell had been employed by Mountview for a period longer than eight years. As I have indicated, Mountview did not participate in the proceedings before the Delegate, notwithstanding it had ample opportunity to do so.

26. However, that is not the end of the matter. Mountview now says that Mr. Fennell must have forgotten that he quit in 1998 and was then re-hired some months later. One may suppose that if the appeal were to proceed on its merits Mountview would claim that its evidence in this regard is new evidence of the sort referred to in section 112(1)(c). That section, however, requires that the appellant demonstrate that the new evidence was not available at the time the Determination was being made. There is nothing in the material submitted by Mountview which suggests the evidence of a quit and re-hiring was not available to it during the time the Delegate was making her Determination.

27. Mountview's reference to section 64 of the *Act* concerning group terminations is inapt. The section only applies if the employment of fifty or more employees at a single location is to be terminated. There is no evidence that the terminations in this case involved such numbers of employees. Further, section 64(4) stipulates that the requirements of section 64 are in addition to the requirements of section 63. The Delegate did not apply section 64 in this case. She only applied section 63. Therefore, Mountview's suggestion that section 64 cannot apply to this case because of the operation of section 65(4)(b) does not

assist it in building an argument that Mountview has made out a strong prima facie case in support of its appeal.

28. Neither does the reference to the successorship provision in section 97 of the *Act* aid Mountview. Section 97 does not apply so as to remove Mountview's obligations. If the new owners of the business had retained the complainants as employees section 97 may have imposed requirements on them based on the years of service the complainants had given to Mountview. In the event, however, this did not occur. Section 97 does not raise issues in this case which establish a strong prima facie case for Mountview.

ORDER

29. Pursuant to section 114(1)(b) of the *Act*, I order that the appeal be dismissed.

Robert Groves
Member
Employment Standards Tribunal